Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE
UNITED STATES SUPREME COURT

79-1750

PETITION FOR WRIT OF CERTIORARI

TO REVIEW THE JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT IN ITS
CASE NO. 79-1491

ROBERT E. FINGAR,

Petitioner,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
A VIRGINIA corporation,

Respondent.

PETITION OF ROBERT E. FINGAR
Petitioner
P. O. Box 552
Callahan, Florida
32011
Pro se

REFERENCE

Petitioner has no knowledge of any offical or unofficial reports of the opinions delivered in the Courts below and the judgment sought to be reviewed is appended hereto in the form on which it was served Petitioner.

GROUNDS FOR INVOKING JURISDICTION

1. Appellate Court departed from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision so that Petitioner's right to due process of law is not denied.

2. On November 16, 1979, Appellate Court rendered judgment sought to be reviewed and Petitioner has no knowledge of its entry time.

3. On February 4, 1980, Appellate Court denied petition for rehearing.

4. Petitioner belives that the Railway Labor Act, as amended, 45 USCA Section 153 First(q) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

It is percieved by Petitioner that the following question along with its subsidiaries comprised therein are presented for review.

> Did the Appellate Court depart from the usual course of judicial proceedings in affirming lower Court's summary judgment and thereby denying Petitioner due process of law under that part of the Railway Labor Act, as amended which is distinguished in 45 USCA Section 153 First(q).

STATUTE AND RULE OF PROCEDURE INVOLVED

1. That part of the Railway Labor Act, as amended and which is distinguished in 45 USCA, Section 153 First(q) at page 728 of 1972 edition and which is herein set out verbatum:

> " (q). If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code. "

2. Summary Judgment Rule 56(c) of Federal Rules of Civil Procedure which is distinguished in the 1971 edition of 28 USCA at page 413 and which is here set out verbatum:

"(c). The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment interlocutory in character may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. "

STATEMENT OF THE CASE

Action was brought in United States District Court pursuant to the Railway Labor Act, as amended, 45 USCA, Section 153First (q) on the basis that Petitioner was grieved by the terms of the dismissal order entered by the First Division, National Railroad Adjustment Board for its Award No.21787 from its Docket No. 42273.

Petitioner distinguished genuine issues as to material facts in his pleadings before the District Court that the First Division failed to comply with the requirements of said Act in entering its dismissal order of untimeliness.

Respondent moved to dismiss pleadings of the Petitioner and the District Court denied.

Respondent subsequently moved for summary judgment on the grounds of res judicata and the District Court granted.

Appellate Court found res judicata did not exist but found that the District Court did not act on the issue of untimeliness and appellate Court then acted in district Court's jurisdiction and decided the untimeliness issue with a decision that Respondent was entitled to the District Court's summary judgment on the grounds of untimeliness. .

ARGUMENT

1. It is the contention of Petitioner that the Appellate Court departed from the usual course of judicial proceedings by deciding said issue of untimeliness which was before the District Court on petition for r view and to which the District Court had not adjudicated.

This departure is prohibited by the Railway Labor Act, as amended, 45 USCA Section 153 First(q); said paragraph (q) of said ACT permitting review in District Courts limits appellate review to issues adjudicated by the District Court.

Moreover, this departure has deprived Petitioner's grievance with the untimeliness term of the order entered by the First Division, National Railroad Adjustment Board for its Award No. 21787 from its Docket No. 42273 from being adjudicated by the District Court as contemplated by said paragraph (q) of said Act. Such deprivation has deprived Petitioner of due process of law as contemplated under said paragraph (q) of said Act.

2. Moreover, in support of this petition, Petitioner contends that the pleadings before the District Court show genuine issues as to material facts on timeliness for the District Court to decide, and , Rule 56(c), Federal Rules of Civil Procedure on summary judgment prohibits the granting of summary judgment as a matter of law when there are genuine issues as to material facts for the District Court to decide.

Wherefore, the writ should be allowed.

Respectfully submitted,

Robert E. Fingar
Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that (2) two copies of the foregoing petition for writ of certiorari have been served to Mr. Gary A. Bubb, Suite 1014, Barnett Bank Building, Jacksonville, Florida - 32202-, counsel for the Respondent, this 2nd day of May, 1980, by United States Mail.

Robert E. Fingar
Petitioner
P. O. Box 552
Callahan, Florida
32011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79 - 1491

ROBERT E. FINGAR,

Plaintiff-Appellant,

versus

SEABOARD COAST LINE RAILROAD COMPANY, A VIRGINIA CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING

(February 4, 1980)

Before GOLDBERG, RONEY and TJOFLAT, Circuit judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Paul H. Roney
United States Circuit Judge.

FORM 703-2

Robert E. FINGAR,
Plaintiff-Appellant,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia Corporation,
Defendant-Appellee.

No. 79-1491
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Nov. 16, 1979.

Action was brought to review order of Railroad Adjustment Board denying relief for alleged grievances and for employment reinstatement. The United States District Court for the Middle District of Florida, Charles R. Scott, J., rendered summary judgment for employer, and plaintiff appealed. The Court of Appeals held that: (1) claim was time barred where not filed within appeal period specified in controlling labor agreement, and (2) decision in prior action involving seniority rights and denial of work assignments was not res judicata of instant claim.

Affirmed.

1. Labor Relations ⇐452

Where controlling labor agreement required that appeal from a superintendent's decision be taken within 45 days but employee waited 18 months after superintendent's denial before appealing to Railroad Adjustment Board, such claim was time barred. Railway Labor Act, § 3(i), 45 U.S.C.A. § 153(i).

2. Labor Relations ⇐452

Where prior action involved railroad employee's grievances concerning seniority rights and denials of work assignments, decision in such case was not res judicata of subsequent complaint of denial of reinstatement after termination for alleged insubordination, especially in view of assertion that dismissal was because of filing of the prior grievances. Railway Labor Act, § 3(q), 45 U.S.C.A. § 153(q).

Appeal from the United States District Court for the Middle District of Florida.

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

In this action to review an order of the Railroad Adjustment Board (Board), 45 U.S.C.A. § 153(q), denying relief for alleged grievances and for employment reinstatement, plaintiff appeals the district court's grant of summary judgment for defendant, claiming the district court erred in ruling his claims were barred by *res judicata*. We find that plaintiff is not entitled to relief since the Board properly dismissed his claim for failure to timely pursue administrative remedies, even though we agree the district court improperly applied the doctrine of *res judicata*. Consequently, we affirm.

[1] Plaintiff's claims against his employer, Seaboard Coast Line Railroad (Seaboard), were presented to his superintendent pursuant to 45 U.S.C.A.

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

Synopses, Syllabi and Key Number Classification
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§ 153(i), on September 9, 1965. A letter denying relief was mailed on September 28, 1965. Eighteen months later, on March 27, 1967, plaintiff appealed to the Board for review of the superintendent's findings. The Board denied relief on December 3, 1971, because the appeal was not timely. Article 32(d) of the controlling labor agreement provided that appeals from a superintendent's decision had to be taken within 45 days. Plaintiff waited eighteen months after the denial letter before trying to appeal. In a different case regarding claims not involved here this Court previously held plaintiff to be bound by the terms of the labor agreement. *Fingar v. Seaboard Air Line Railroad Co.*, 277 F.2d 698, 700, 701 (5th Cir. 1960). Accordingly, plaintiff's claim is time-barred from review and the district court's summary judgment for defendant is due to be affirmed.

The district court had granted Seaboard's motion for summary judgment on grounds of *res judicata*, without mentioning the out of time appeal to the Board. The court found that the instant case and an earlier action involved the same parties and the same claims, and was therefore barred.

The earlier action involved grievances filed in 1964 and 1965 regarding seniority rights and denials of work assignments while plaintiff was a Seaboard employee. Seaboard rejected those grievances. The Board denied relief for failure to take a timely appeal and the United States District Court for the Middle District of Florida likewise denied relief.

[2] In the action here plaintiff, following his discharge for alleged insubordination, had presented additional grievances to Seaboard, seeking reinstatement and pay for work denied him just prior to his discharge. This was different from the claims made in the earlier actions, and not subject to the bar of *res judicata*.

> Under the doctrine of bar, a judgment in a prior suit between the same parties bars a second suit on the same cause of action not only as to all matters offered at the first proceeding, but also as to all issues that could have been presented either for or against recovery.

Moch v. East Baton Rouge Parish School Board, 548 F.2d 594, 596 (5th Cir.), *cert. denied*, 434 U.S. 859, 98 S.Ct. 183, 54 L.Ed.2d 132 (1977).

The first action here involved grievances over seniority rights and denials of work assignments while plaintiff was still an employee of Seaboard. In the present case, plaintiff contests, among other things, his denial of reinstatement after termination for alleged insubordination. Plaintiff's complaints while still an employee involved matters in a different time frame than plaintiff's reinstatement claim. In fact, at one point in the instant action, plaintiff contended that he was dismissed *because* he persisted in filing the prior grievances against Seaboard. The claims asserted by plaintiff in the present action were distinct in time from those asserted in the first, and could not have been raised in the first administrative action. Accordingly, the present action is not barred by the first.

The court should have dismissed the claims because of an untimely appeal to the Board, rather than on *res judicata* grounds.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ROBERT E. FINGAR,

Plaintiff,

vs.

No. 73 - 413 - Civ - J - S

SEABOARD COAST LINE RAILROAD COMPANY. a Virginia corporation,

Defendant.

OPINION

Defendant has moved for summary judgment on the ground that plaintiff is barred from bringing this action by the principle of res judicata. In FINGAR v. United States RR.Retirement Board, 402 F. 2d 544 (5th Cir. 1968), the Court of Appeals affirmed a decision of the Railroad Retirement Board, denying plaintiff's claim for unemployment benefits. Likewise, in FINGAR v. SEABOARD COAST LINE RR. CO., 68 - 306 - Civ - J-M, plaintiff brought an action with highly similar allegations, seeking reinstatement, an award of lost seniority, and back pay. That case was dismissed on the merits, pursuant to Fed. R. Civ.P. 41(b), on February 27, 1969. In the present case, defendant contends that the affirmance by the Court of Appeals in FINGAR v. UNITED STATES RR. RETIREMENT BD., 402 F. 2d 544, and by this Court in FINGAR v. SEABOARD COASTLINE RR. CO., 68-306-Civ-J-M (the appeal from which was dismissed by the Court of Appeals), constitute a final adjudication on the merits of all litigated issues, and litigable issues, which stem from the same set of facts comprising plaintiff's claim. If that is so, then plaintiff is precluded from attempting to litigate issues that could have been raised, litigated, and decided in the earlier two cases.

The principle of res judicata in federal law is that, where a claim in a later case is identical

to the claim that was adjudicated in an earlier case; and where the parties in the later case are identical to, or in privity with, the parties in the earlier case, the judgment reached in the earlier case precludes the parties in the later case from attempting to relitigate that claim, including all issues pertaining to the claim, whether or not they were actually litigated in the earlier case. The essential elements of federal res judicata, therefore, are (1) two cases, (2) one of which has proceeded to judgment, (3) raising identical claims, (4) by the same parties or persons in privity with those parties. Lawlor v. National Scren Service Corp., 349 U. S. 322, 326, 99 L. Ed. 1122, 1126 (1955); Moch v. East Baton Rouge Parrish School Bd., 548 F 2d 594, 596 (5th Cir. 1977); International Ass!n. of Machinists & Aerospace Workers v. Nix, 512 F. "d 710, 715, 718 (5th Cir. 1975); Aerojet-General Corp. v. Askew, 512 F. 2d 125, 131 (5th Cir. 1975); American Heritage Life Ins. Co. v. Heritage Life Ins. Co.,494 F. 2d 3, 8, (1974). The doctrine of res judicata is premised on the principle of judicial finality, precluding the relitigation of a claim only after the same parties have had a reasonable opportunity to litigate that claim before a court of competent jurisdiction, and a final decision concerning the claim has been reached. Kaspar Wire Works v. Leco Engineering and Machine, Inc., 575 F. 2d 530, 537-38 (5th Cir. 1978); Stevenson v. International Paper Co., 516 F. 2d 103, 109 (5th Cir 1975).

Identity of Parties. Where the same claim has been decided in one case by the same parties for attempting to relitigate in a second case, those psrties, or persons in privity with them, are preclued from relitigating the claim. Under the common law, res judicata prevents by bar or merger the relitigation of a claim only by the same parties, or those in privity with them. Southwest Airlines Co. v. Texas Int'l Airlines, 546 F. 2d 84, 95 (5th Cir. 1977), cert. den. 434 U. S. 832, 54 L. Ed.2d 93 (1977).

In the present case, there is no question that plaintiff is the same individual who was plaintiff in Fingar v. United States RR. Retirement Bd., 402

F. 2d 544 (5th Cir. 1968), and in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M.

Identy of Claims . Res judicata is a principle of claim preclusion. Only if the claims in two cases are identical will the judgment in the first case prevent relitigation in the second case. The identy of claims raised in two cases, therefore, is an indispensable element for res judicata. International Ass'n. of Machinists & Aerospace Workers v. Nix, 512 F.2d at 131; American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F 2d at 9. In determing whether a claim in a later case is identical to that cited on a prior case, courts must look to the substance and subject matter of two cases, not their appearance. Courts must look past the mere language and labels of the pleadings, beyond the legal theories devised and advanced, to discern the nature of the actions. Aerojet-General Corp. v. Askew 511 f. 2d at 715; Astron Industrial Assoc., Inc. v. Chrysler Motors Corp., 405 F. 2d 958, 961 (5th Cir. 1968); Acree v. Airline Pilot's Ass'n., 390 F. 2d 199, 201 (5th Cir. 1968); cert. den. 393 U. S. 852, 21 L. Ed. 2d 122 (1968). " It is the substance of action that counts. " Acre v. Airline Pilots Ass'n., 390 F. 2d at 201. cf. Wilson Cyprus Co. v. Atlantic Coastline Ry. Co., 109 F. 2d 623, 627 (5th Cir. 1940), cert. den., 310 U. S. 653, 84 L. Ed. 1418 (1940). The test for determing whether two cases involve an identical claim, already decided in one of those cases, involves three questions: (1) is the same right infringed by the same wrong in both cases? (2) would a different judgment in the second case impair rights that were established and protected by the judgment in the first case ? (3) would the same evidence sustain both the judgment in the first case and the judgment in the second ? Aerojet-General Corp. v. Askew, 511 F 2d 718; Astron Industrial Assoc., Inc. v. Chrysler Motors Corp., 405 F. 2d at 961; Acree v. Airline Pilots Ass'n., 390 F. 2d at 201.

Under that test, it becomes clear that the genuine nature of this case, and of Fingar v. Seaboard Coastline RR.Co., 68-306-Civ-J-M, are essentially and in substance the same. The same rights, alledged to have been infringed, are sought to be redressed in both cases: the right to back pay and to lost seniority.

The fact that plaintiff in the case at hand proceeds solely on his own behalf, while in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M,/ he purported to represent a class of plaintiffs, does not alter in any way the character of Plaintiff's rights that he seeks to enforce. In the earlier case, Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, Judge McRae dismissed the case on the merits. Pursuant to Fed. R. Civ. P. 41(b) that dismissal was with prejudice. For this same Court to now hold differently in the present case, would clearly impair the rights and duties of both plaintiff and defendant that were established and protected by the dismissal on the merits in that earlier case. Finally, there could be little question that the same evidence would support the final order of dismissal on the merits in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, and the Court's decision in this case. In his memorandum of law, filed June 7, 1974, plaintiff acknowledges that his separate lawsuits are generated by, and derived from, the same intrinsic set of fact; but he asserts that the actions are for a different purpose. Founded squarely upon the same intrinisic set of facts, it is indisputable that the facts in the present case could readily be substituted for the evidentiary facts alleged in the earlier case, Fingar v. Seaboard Coastline RR. Co., 68-306- Civ-J-M, and the law would still reuire the same decision in that case. The law, therefore, dictates that the same decision of dismissal on the merits should be reached in the present case. Thus, the Court concludes that the claim presented and decided in Fingar v. Coastline RR. Co.68-306-Civ-J-M is essentially identical to the claim in the case at hand.

Having concluded that plaintiff and defendant are identical in in the same procedural posture in the present case, and in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, and that the same claim in substance is raised in both cases, the Court holds that the final decision of dismissal on the merits, reached in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, is necessarily conclusive and binding on the claim in the present case.

In short, the Court holds that the principle of res judicata applies to bar litigation of plaintiff's claim in this case, inasmuch as it would be an attempt to relitigate the claim, together with all issues that were actually litigated, or could have been litigated, in Fingar v. Seaboard Coastline RR.Co., 68-306-Civ-J-M. As a result, plaintiff is estopped from attempting to relitigate any of those issues in the present case. Accordingly, a summary final judgment shall be issued on behalf of defendant.

ISSUED at Jacksonville, Florida, this 27th day of December, 1978.

(s) Charles R. Scott
Senior United States District Judge

FORM 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
With Referee Byron R. Abernathy

Award 21787

Docket 42273

PARTIES (Robert E. Fingar
TO (
DISPUTE (
(Seaboard Coastline Railroad Company

STATEMENT OF CLAIM:

" Herein, Claims (A), (B) and (C) are made by Florida Divisions' Switch Engineer Robert Edwin Fingar who hereinafter will also be referred to as claimant and/or petitioner and who has obtained establishment of a seniority date as a Florida Divisions' Switch Engineer by the claimant's vested standing on the Florida Divisions' Yard Engineers' Seniority Roster after promotion to switching service on December 31, 1955 from the position of Florida Divisions'Switch Fireman and which was obtained December 25, 1949 by the claimant's standing on the Florida Divisions' Yard Firemen Seniority Roster. "

" CLAIM (A):

Claim is made for the reinstatement of the claimant Robert Edwin Fingar to the service of the Florida Divisions' of the Seaboard Air Line Railroad Company, now known as the Seaboard Coast Line Railroad Company, which hereinafter will be also referred to as carrier and/or respondent, with all seniority and all vested employment rights unimpaired and with all pay at the yard rate for engineers for all time lost beginning with June 1, 1965 and for all subsequent dates until the claimant is reinstated by the provision of Article 31 of the Engineers Schedule and of the Firemen and Hostlers Schedule. This claim is due to the fact, that, the claimant was wrongfully discharged, at 7:10 p. m., on June 1, 1965, from the service of

the carrier and respondent Seaboard Air Line Railroad Company for the charge, without fact, of vio- of Rules 702, 703 and 950, for a supposedly violation of so-called instructions supposedly extended to the claimant bt so-called letters supposedly written by Superintendent L. C. Bates of February 26, 1963, February 7, 1 964, and Superintendent C. H. Cook's so-called letter of May 6, 1965, at which time, claimant supposedly was so-called advised to discontinue this supposedly practice of so=called filing claims, which supposedly, had no so-called contractual basis, and, to persist, would be considered a so-called act of insubordination. Claimant, supposedly, filed such so-called claims April 1 and April 8, 1965. "

CLAIM (B) :

" Claim is made by the claimant for one yard day at the yard rate for engineers for each of the following dates beginning with March 1, 1965 through April 15, 1965 and for all of the subsequent dates on which he is denied the engineer's position on the No. 2 Fernandina Switch Engine Assignment and/or denied the engineer's position on the locomotive assigned to and/or inducted to run on Fernandina yard, Florida for the purpose of performing all switching work, other than doubling the head end of a train over where one track will not hold the entire train, at and within the switching limits of Fernandina Yard, Florida."

" CLAIM (C): Claim is made by the claimant for one yard day at the yard rate for engineers for each of the following dates beginning with April 1, 1965 through May 15, 1965 and for all subsequent dates on which he is denied the engineer's position on the 2nd Lake Wales Switch Engine Assignment ans/or denied the engineer's position on the locomotive assigned to and/or inducted to run on Lake Wales Yard, Florida for the purpose of performing all switching work, other than doubling the head end of a train over where one track will not hold the entire train, at and within the switching limits of Lake Wales Yard, Florida.

FINDINGS : " The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction. "

" Hearing was held. "

" The record here stands unrefuted that the claimant was dismissed from the service of this carrier effective July 26, 1965; that the claims herein under consideration identified as Claims (A), (B) and (C), were presented to the Superintendent on September 9, 1965; that conference on these claims was held on September 24, 1965; that the Superintendent thereafter rendered his decision on September 28, 1965, denying all such claims; and that no appeal was taken from the Superintendent's decuntil March 27, 1967, some one and one-half years later. "

" Article 32(d) of the controlling BLE Agreement provides that;

> "(d) Engineers shall have the right to appeal to the next ranking officer, provided such an appeal be made in writing within forty-five (45) days after the Superintendent has rendered his decision to the engineer or the engineer's local committee. "

" Claimant's appeal from the Superintendent's decision of September 28, 1965, therefore was not timely made, and these claims are not now properly before this Board. Accordingly these claims must be dismissed for want of jurisdiction. "

"AWARD: Claims dismissed. "

National Railroad Adjustment Board, by order of the First Division. "

Supreme Court, U. S.
FILED
JUN 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

UNITED STATES SUPREME COURT

NO. 79-1750

ROBERT E. FINGAR,

Petitioner,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
A Virginia corporation,

Respondent.

REPLY BRIEF TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Gary A. Bubb
TOOLE, TAYLOR, MOSELEY & JOYNER
1000 Barnett Bank Building
Jacksonville, Florida 32202
904/356-1306

Attorneys for Respondent.

I. REFERENCE TO REPORTS OF OPINIONS DELIVERED BELOW

To Respondent's knowledge, the opinion of the United States District Court for the Middle District of Florida, Jacksonville Division, No. 73-413-Civ-J-S is unreported. The opinion of the Circuit Court of Appeals of the Fifth Circuit appears as Fingar vs. Seaboard Coast Line R. Co., 606 F.2d 648 (5th Cir. 1979).

II. QUESTION PRESENTED ON PETITION FOR CERTIORARI

Respondent believes that a more precise statement of the question presented for review upon this Petition for Certiorari is as follows: Did the Court of Appeals for the Fifth Circuit deny Petitioner due process of law by basing its decision on another ground than that relied upon by the United States District Court?

III. STATEMENT OF THE CASE

Respondent respectfully submits that a more concise and accurate statement of the case is as follows:

Petitioner originally brought an action in the United States District Court for the Middle District of Florida, Jacksonville Division, pursuant to the Railway Labor Act, 45 U.S.C. §153(q), to review an award and decision by the National Railroad Adjustment Board, First Division, No. 21787, Docket No. 42273.

The award of the National Railroad Adjustment Board, First Division, sought to be reviewed, conclusively found that under the controlling labor agreement then in existence, Peti-

tioner's appeal to the National Railroad Adjustment Board was untimely, and therefore his claim was time barred.

Thereafter, Respondent moved the District Court for Summary Judgment on several grounds, including res judicata, estoppel, and the final and binding nature of the award by the National Railroad Adjustment Board. Thereafter, the District Court entered Summary Judgment for Respondent Railroad on the grounds of res judicata.

Upon appeal to the United States Court of Appeals for the Fifth Circuit, the Court affirmed the entry of Summary Judgment on the grounds that Plaintiff was not entitled to relief since the National Railroad Adjustment Board properly dismissed his claim for failure to timely pursue his administrative remedies, even though the Appellate Court agreed that the District Court improperly applied the doctrine of res judicata in granting Summary Judgment for Respondent.

Thereafter, upon Petitioner's application for rehearing, the United States Court of Appeals for the Fifth Circuit denied said petition on February 4, 1980, and Petitioner filed this Petition for Certiorari, and same was docketed in the Supreme Court of the United States on the 5th day of May, 1980. Respondent received the Petition for Certiorari on May 8, 1980 and thereafter timely filed this Reply.

IV. ARGUMENT

Respondent respectfully submits that Petitioner has failed to cite any sufficient authority or grounds for invoking this Court's jurisdiction on the Petition for Certiorari. No conflicting decisions of this Court or of any other United States Court of Appeals has been submitted by Petitioner.

Petitioner merely states that the United States Court of Appeals for the Fifth Circuit has departed from the provisions of the Railway Labor Act, 45 U.S.C. §153(q). Petitioner has not demonstrated in what manner the Appellate Court departed from the requirements of the Railway Labor Act.

It would appear, as described in Respondent's version of the question presented for this Honorable Court, that Petitioner contends he was denied due process of law by the manner in which the United States Court of Appeals for the Fifth Circuit decided this case. What Petitioner is really complaining about, is that the Appellate Court affirmed the judgment of the District Court on different grounds than those relied upon by the District Court.

It has long been held since Justice Brandeis' opinion in *Helvering v. Gowran,* 302 U.S. 238, 58 S.Ct. 154, 82 L.Ed 224 (1937), that the settled rule is that, if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason. Likewise, it has been held proper for an Appellate Court to affirm a correct decision of the lower Court even when that decision is based on an inappropriate ground or even though the lower Court relied on a different or even wrong reason. *PAAC v. Rizzo,* 502 F.2d 306 (3rd Cir. 1974), *cert. denied* 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804; *U. S. v. Com. of Pa.,* 533 F.2d 107 (3rd Cir. 1976). See also: *Palmer v. R.F.C.,* 164 F.2d 466 (2nd Cir., 1947), *cert denied* 334 U.S. 811, 68 S.Ct. 1016, 92 L.Ed. 1742.

It is therefore abundantly clear under decisions of this Court and decisions of the United States Courts of Appeal that the Appellate Court in this case did not depart from the standard and regularly accepted practice of appellate review

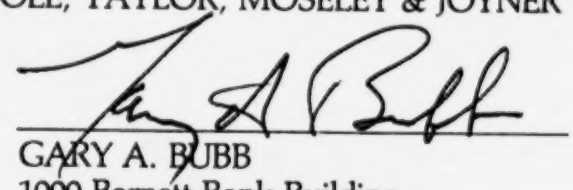
so as to deny Petitioner due process of law. The United States Court of Appeals for the Fifth Circuit had before it the entire record in this case, examined same, and rendered its decision accordingly.

It is respectfully submitted that Petitioner has utterly failed to demonstrate sufficient grounds for this Court to invoke its certiorari jurisdiction, and therefore, the Petition for Certiorari should be denied.

V. CONCLUSION

It is respectfully submitted that since Petitioner has failed to present this Honorable Court with any conflicting decisions of this Court or of other United States Courts of Appeal, and has failed to demonstrate with particularity his claimed denial of due process, his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

TOOLE, TAYLOR, MOSELEY & JOYNER

By 

GARY A. BUBB
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief to Petitioner's Petition for Writ of Certiorari has been furnished to ROBERT E. FINGAR, Post Office Box 552, Callahan, Florida 32011, by U. S. Mail, this 2 day of June, 1980.

ATTORNEY

Supreme Court, U. S.
FILED
JUN 19 1980
MICHAEL RODAK, JR., CLERK

IN THE
UNITED STATES SUPREME COURT

NO. 79 - 1750

ROBERT E. FINGAR,

Petitioner,

versus

SEABOARD COAST LINE RAILROAD COMPANY, a VIRGINIA corporation,

Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OF ROBERT E. FINGAR
Petitioner
P. O. Box 552
Callahan, Florida
32011

Pro se

Comes now Petitioner, Robert E. Fingar, and replies to Respondent's opposition to Petition for Writ of Certiorari with the following brief:

I. PETITION FOR WRIT OF CERTIORARI CITES SUFFICIENT AUTHORITY AND GROUNDS FOR INVOKING THIS COURT'S JURISDICTION AND DEMONSTRATES APPELLATE COURT'S DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDURE

1. The authority for invoking this Court's jurisdiction is predicated on the provision of the Railway Labor Act, as amended, 45 USCA, Section 153 First (q), and the Petition for Writ so indicates such statutory authority, and, this Court's Rule 23(1)(iii) and captioned (The Petition for Certiorari) distinguishes that statutory authority is the primary authority for invoking this Court's jurisdiction.

2. The grounds for invoking this Court's jurisdiction is that the appellate Court for the United States Fifth Circuit departed from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision so that Petitioner's right to due process of law is not denied, and, the Petition for Writ of Certiorari so indicates such grounds.

3. The appellate Court's departure from the usual course of judicial proceedings is demonstrated by its panel deciding (contrary to the United States District Court's statutory jurisdiction to do so) Petitioner's grievance with the untimeliness term of the order for Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273. This departure is demonstrated in the Petition for Writ of Certiorari.

In statute, pursuant to the Railway Labor Act, as amended, 45 USCA Section 153 First (q), jurisdiction on petition for review brought by either party who is grieved by the terms of an award entered by any division of the Adjustment Board is vested in the district courts of the United States, and, pursuant to paragraph (q) of said section, the district Court upon review shall have jurisdiction to affirm the order of the division or to set it aside for failure to comply with the requirements of this Act.

Here, the Petition for Writ of Certiorari distinguishes that the district Court neither affirmed nor set aside the order of the division, rather, at the urging of Respondent, district Court entered summary judgment in favor of Respondent on the ground of res judicata and dismissed the claims premised in Award No 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

Pursuant to the principle of res judicata, the district Court had no choice but to dismiss the case, for no issue can be litigated when res judicata is determined to exist.

Upon determination by appellate Court that res judicata did not exist, this did not give appellate Court jurisdiction to determine the timeliness issue on which Petitioner brought this case into the United States District Court and thereby use such decision for affirming district Court's summary judgment for respondent.

Upon determing that res judicata did not exist, the appellate Court should have reversed the district Court's summary judgment and sent the case back to the district Court for judgment on Petitioner's grievance with the timeliness term of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

4. Moreover, appellate Court's departure from the usual course of judicial proceeding is demonstrated byits affirming district court's

summary judgment when there are genuine issues of material fact on timeliness pending in the district Court for a decision by the district Court pursuant to the requirements of the Railway Labor Act, as amended, 45 USCA Section 153 First (q), and, the Petition for Writ of Certiorari distinguishes this departure.

Rule 56(c), Federal Rules of Civil Procedure on summary judgment prohibits the granting of summary judgment as a matter of law when there are genuine issues as to material facts for the district court to decide, and the Petition for Writ of Certiorari distinguishes this prohibition, and this prohibition has been affirmed by the Federal Appellate and District Courts for New York - GOVERNMENT OF INDIA v. CARGILL, Inc., (1978) 445 F. Supp. 714, and , this citation is used as one of the current annotations for said Rule 56(c) and for said paragraph (q) of said ACT.

II. RESPONDENT'S CASE CITATIONS ARE IRRELEVANT FOR OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI

The case citations used by Respondent in opposition to granting petition for writ of certiorari are based on the precept of the lower Court's judgment being correct. This precept of correctness does not exist for the judgment on which the application for certiorari is made, and this reasoning is elementary:

1. The district Court's summary judgment was grounded in res judicata and was premised on Petitioner's claim against Respondent to rights to runs and for reinstatement to Respondents service rather than being premised on Petitioner's grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

2. As previously stated, the Railway Labor Act, as amended, 45 USCA Section 153 First(q) is the basis for jurisdiction in the district Court and such jurisdiction does not permit district Courts to premise a judgment on the merits on Petitioner's claims agains the Respondent , and, the United States Court of Appeals for the Nineth Circuit refused to do so upon the encourgement of the Baltimore and Ohio Railroad to so do in System FEDERATION, No. 30, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, et al Plaintiffs v. BRIADWOOD et al., Defendants (1968).

Such refusal was grounded on the precept that an incorrect judgment would be the result because the B & O would be getting what it considered a correct judgment and to which the Nineth Circuit Court determined would be the wrong way.

3. The Railway Labor Act, as amended, 45 USCA Section 151, under " GENERAL PURPOSE " defines the purpose of said Act to be for the peaceful resolvement of disputes between employee and employer.

A Petition for Review in the United States District Court is one of the steps involved in such revolvement for dispute resolvement.

Here, Petitioner has been denied the Petition for Review step by the district Court entering a summary judgment premised on Petitioner's claims against Respondent rather than being premised by law on Petitioner's grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

Likewise, the Fifth Circuit Court's judgment affirming district Court's summary judgment is incorrect because it also premises its judgment on Petitioner's claim against Respondent rather than on his grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273.

Thusly, summary judgment as entered by the district Court and as affirmed by the Appellate Court for the United States Fifth Circuit, both are incorrect, for both are premised on Petitioner's claim against Respondent and to such claims, neither Court has jurisdiction under said Act.

The district Court said litigation of such claims were barred by res judicata. and, the appellate Court for the United States Fifth Circuit said the review of such claims could not be had until contractual requirements had been met.

Neither review or litigation of such claims against Respondent is sought in this action, only Petitioner's grievance with the terms of Award No. 21787 entered by the First Division, National Railroad Adjustment Board is sought to be administered,United States District Court, and, this is done, pursuant to Section 153 First(q) of said Act, by filing a Petition for Review in a distrct Court to review the terms of an order of a Division of the National Railroad Adjustment Board and not by Petition to Review claims premised in such Division's ORDER.

III. APPELLATE COURT FOR THE UNITED STATES FIFTH CIRCUIT WAS NOT BRIEFED ON THE RECORD FOR ISSUES OTHER THAN RES JUDICATA

The Respondent opposes the granting of the Petition for Writ of Certiorari on the premise that appellate Court had entire record before it and thereby did not depart from the usual course of appellate review.

It is true that the entire record was before appellate Court, but, the parties had not briefed the appellate Court or district Court on any issue other than-res judicata which is due to the fact, as previously stated, that under the principle of res judicata no issue may be litigated when res judicata is found by the district Court.

The opinions of both Courts hereof reflect no adjudication on any issue other than res judicata in the distrct Court. Likewise, the briefs of both parties stipulate that their briefs' are only on the issue of res judicata and further reflect that res judicata is the only issue adjudicated by the district Court and that res judicata is the only issue on appeal to the appellate Court.

As previously stated, Section 153 First(q) of said ACT, limits appellate review to issues adjudicated by the district Court, and, appellate Court found district Court had only acted on the issue of res judicata and not on the issue of untimeliness before it, and, thence, appellate Court entered the statutorily jurisdictional realm of the district Court and decided an issue of material fact pending before the district Court and used such decision for affirming district Court's summary judgment on the issue of res judicata.

This depature is prohibited by the Railway Labor Act, as amended, 45 USCA Section 153 First (q); said departure has deprived Petitioner of his statutpry right to a district Court review of his grievance with the terms of the order for Award No 21787 entered by the First Division, National Railroad Adjustment Board for its Docket No. 42273, and, therefrom, the Petition for Writ of Certiorari should be granted rather than denied as respondent would urge.

Respectfully submitted,

Robert E. Fingar
Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply has been served to Mr. Gary A. Bubb, 1000 Barnett Bank Building, Jacksonville, Florida 32202-, counsel for the Respondent, this 15th day of June, 1980, by United States Mail.

Robert E. Fingar
Petitioner